FILED
FEB 18 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~964~~ 28

THE WASHINGTON TERMINAL COMPANY,
Petitioner,

v.

J. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, et al.

PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

JOHN DICKINSON,
GUY W. KNIGHT,
JOHN B. PRIBER,
1740 BROAD ST. STATION BLDG.,
PHILADELPHIA, PA.
Counsel for Petitioner.

FEBRUARY 18, 1942.

KAY, LANE & SCOTT, PRS., PHILADELPHIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941. No. .

The Washington Terminal Company, Petitioner

v.

F. E. Boswell, E. R. Burkhead, R. R. Bridges, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Washington Terminal Company prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above cause on November 18, 1941 (R. 382), which affirmed the judgment of the District Court of the United States for the District of Columbia dismissing the complaint herein.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 331-48), and the dissenting opinion of Mr. Justice Stephens (R. 348-81), were handed down on November 18, 1941, and are reported in 124 F. (2d) 235.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on November 18, 1941 (R. 382). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. 347, 43 Stat. 938).

STATUTES INVOLVED.

This suit is brought under and in accordance with the Declaratory Judgments Act of June 14, 1934, c. 512, 48 Stat. 955, as amended. The pertinent provisions thereof are as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or

could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Certain provisions of the Railway Labor Act (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. 151 *et seq.*) are involved because they have been relied on by respondents in the courts below. The portions of the Act principally concerned are Sections 3 First (i) and (p), which provide as follows:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the car-

rier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

QUESTIONS PRESENTED.

1. Whether or not Section 3 First (p) of the Railway Labor Act is to be construed, in the absence of express statutory language to that effect, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of

jurisdiction to entertain a declaratory judgment proceeding, where such a proceeding would otherwise be appropriate.

2. Whether or not Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes.

3. Whether or not the conclusion of the court below, to the effect that the unilateral submission of a dispute by employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the court to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Railway Labor Act, gives to the Railway Labor Act a construction which is unreasonable and is inconsistent with the construction placed upon it by this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941), wherein it was held that the procedure by the Railway Labor Act for the adjustment of such disputes was not intended to be exclusive.

4. Whether or not, in the face of Article 3, Section 1, of the Constitution of the United States, and of the due process clause of the Fifth Amendment to the Constitution, the Railway Labor Act, and more specifically Section 3 First (p) thereof, is to be given a construction which would have the effect of making the awards of a non-judicial body, like the National Railroad Adjustment Board, to all practical purposes final save at the option of the employes, and which would have the effect of closing the doors of the courts to railroad employers with the result of subjecting them to economic pressure in order to compel them to comply with such awards.

GROUNDS FOR APPLYING FOR WRIT.

1. It is a matter of public importance that the Railway Labor Act of 1934, which has been erroneously and unreasonably construed by the Court of Appeals below, should be properly and reasonably construed so that it will not close the doors of the courts against the employer-party to a collective agreement, while the employes can exert economic coercion against him to compel him to give to the agreement such meaning as the employes wish it to have.

2. The decision of the Court of Appeals below is in conflict with the decision of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941), in construing the system of "ad-

justment" established by the Railway Labor Act as amounting in practical operation to a scheme of compulsory arbitration with power of final and conclusive decision vested in the Adjustment Board, which is not only a non-judicial body but observes none of the safeguards of judicial procedure.

3. The rights of petitioner herein, and the public interest in the efficient and economic operation of railroad transportation, are seriously impaired by the decision of the Court of Appeals below.

STATEMENT.

Petitioner is a corporation which, since 1907, has operated the Union Passenger Station, including an adjacent railroad yard and tracks, in Washington, D. C. Respondents are petitioner's employes, who man its switch engines as engineers and firemen. The facilities of the passenger station and the adjacent yards and tracks are used by The Pennsylvania Railroad Company, the Baltimore & Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Chesapeake & Ohio Railway Company—called the Tenant Lines—which operate passenger trains to, from and through Washington. The petitioner itself operates no passenger trains and employs no road-engine or road-train crews.

It has been the continuous operating practice at

the Terminal, since it was opened for use in 1907, that, when a loaded passenger train comes into the station from other places and has discharged its passengers at the platform, the road-engine, manned by the road-engine crew which brought the train in over the road, may haul the empty passenger cars to the storage yard en route to the round-house, whenever, in the judgment of petitioner, the efficient and prompt operation of the Terminal is thereby promoted. Similarly, when the preparation of a passenger train to leave Washington is called for, the road-engine, manned by the crew which will operate the train over the road, picks up the empty cars on its way from the engine-house to the station, and backs the train of cars to the platform to receive passengers preparatory to leaving on its trip, whenever efficiency and promptness of operation so require. These road-engine crews are employes of the Tenant Lines. (Complaint, Pars, 8, 9, 10; R. 5.)

On February 1, 1923, a collective agreement in writing was entered into between petitioner and its yard-engine employes, the class of employes to which respondents belong. (Complaint, Par. 17; R. 7.) This agreement contained, among other things, provisions regarding so-called "seniority rights" of the employes, which were substantially the same as those which had been contained in the contracts of employment between petitioner and its yard employes since June 1, 1910. (Complaint, Pars. 12, 13, 14, 15; R. 6; Exs. A. B. C. D; R. 15-39.) These "seniority rights"

entitled employes to vacancies and new jobs in the order of seniority of the employes who applied for them, and also provided for seniority as a factor in promotion. This agreement, with some immaterial amendments made from time to time, is still in effect. (Complaint, Par. 16; R. 7.)

After these agreements, containing substantially the same terms, had been in effect for many years, petitioners' yard employes advanced the contention out of which the present application for a declaratory judgment ultimately eventuated. That contention was to the effect that the agreement of 1923, by according "seniority" rights to yard engine employes, thereby conferred upon such employes by necessary implication a monopoly or exclusive right to perform without exception all work on petitioners' premises capable of being regarded or defined as "yard work," and that such "yard work" must be construed as including the work of moving empty passenger trains between the station and the storage yard,—this despite the fact that, at the time of the original grant of seniority in 1910 and thereafter, both before and subsequently to the contract of 1923, such work had, under the practice and usage of the terminal, continuously been performed by road engines of the Tenant Lines manned by road crews. (Complaint, Par. 19; R. 8.) In opposition to this contention, petitioner has consistently maintained that the 1923 agreement cannot lawfully be construed to confer on such employes any exclusive right to do the work claimed, in view

of the practice known to, and understood by, the parties before and at the time when that agreement was made and since that time, in the light of which practice the contract must, on universally accepted principles of general contract law, be interpreted. (Complaint, Par. 32; R. 12.)

After this controversy originated and the yard employes' claims had been rejected by petitioner, the employes without the concurrence or consent or participation of petitioner submitted the claim to the First Division of the National Railroad Adjustment Board. This Board was created by the amended Railway Labor Act enacted by Congress in 1934.

That Act set up the National Railroad Adjustment Board for the "adjustment" of disputes between carriers and their employes arising out of contracts with respect to rules, rates of pay and working conditions. The Board is composed of a number of Divisions. The First Division consists of ten members, five selected by the railroads and five by the national railroad labor organizations. The Act designates the First Division as the one to hear disputes between the carriers and their train and engine service employes. (Complaint, Par. 19, R. 8.)

In accordance with the Board's practice, the First Division, upon receiving the claim of petitioner's yard employes, notified petitioner to file a statement of its position within 30 days, and thereafter fixed a date for the appearance of petitioner and the representatives of the employes. Under the Railway Labor

Act (Section 3 First (i)), the Board was authorized to render an award at the request of one of the parties alone, and therefore petitioner was obliged to appear before the Board and separately state its contentions in opposition to the claim, at the risk of otherwise having an award or order of the Division entered against it by default. (Complaint, Pars. 19 to 22, inc.; R. 8.)

At the so-called "hearing" before the Division, witnesses could not be called and evidence could not be introduced because the rules of the Division forbade it (Complaint, Ex. E; R. 40-43). Thereafter, the Division was apparently unable to reach a decision because of the deadlock of its members, and, under the provisions of the Railway Labor Act (Section 3 First (l)), a Referee was appointed to sit with the Division and break the deadlock. In accordance with the Division's established practice, no opportunity was given petitioner to appear before the Referee or present to him written or oral argument on the facts or the law. With the participation of the Referee, the Division decided the claim in favor of the employes, and, on October 24, 1938, it issued an "award" sustaining the claim. (Complaint, Pars. 24, 25, 26; R. 9.)

Petitioner, believing the award to be erroneous in point of law and not required by or in accord with the agreement of 1923, did not change its operating practices to conform to the award. Within a month after the date of the award respondents began to

present, and have continued to present, claims and demands upon petitioner for sums of money that they allege they would have earned had they been permitted to perform the work which they claim they have a right to perform under the contract, but which is being performed by road-crews of the Tenant Lines. These claims for payments have been made notwithstanding the fact that many of respondents are and have been, during the period for which the claims are presented, actually engaged in performing yard work in and about the Terminal for which they are already receiving and have received full daily wages. Their demands thus amount to claims for wages which they contend they should be permitted to earn for performing work now being done by the road-crews of the Tenant Lines, in addition to the wages which they are actually earning. (Complaint, Par. 29; R. 11.)

The Railway Labor Act (Section 3 First (p)) authorizes a person for whose benefit an award by a Division of the Adjustment Board has been made to bring a proceeding to enforce the award in an appropriate United States District Court, within two years from the time the cause of action accrues under the award. No suit on the award in question has been instituted against petitioner. The Railway Labor Act makes no provision for a statutory method whereby the carrier against whom an award has been made by the Board can invoke the jurisdiction of the courts to determine the validity or legal effectiveness of the award.

The demands of respondents, if met in full by petitioner, would require the payment by it of a total principal amount of approximately $80,000 a year. Petitioner, in addition to being pressed by respondents for payment, was confronted with the dilemma of having to decide between complying at once with the award and thereby waiving all opportunity for judicial determination of its rights and obligations under the contract of 1923, on which the award was purportedly based, or waiting until such time as respondents might choose to sue on the award, in which event petitioner might be compelled to pay the full amount of wages claimed by respondents for work not performed by them, in addition to the wages paid to other employes for performing that work (Complaint, Pars. 28-32; R. 10-13).

In other words, if petitioner, faced with an award against it of the kind involved in the present suit, should refuse to comply with the award and at the same time had no opportunity for initiating a proceeding for judicial determination of its obligations under the contract on which the award was purportedly based, the employes might wait until the last day of the two-year period before bringing an enforcement suit, in which event, if the enforcement suit were successful, petitioner would be obliged to pay twice over for all the work in question done during the two-year period and prior thereto—once to the employes who in fact performed the work and a second time to the claimants who claimed the right

to perform the work but did not in fact do it. These circumstances would inevitably constitute a steadily increasing pressure on petitioner to comply immediately with the award by changing its operating practices and thereby reducing the damages to the amount of back wages accruing to the claimants up to the date of such change.

The experience of rail carrier-employers generally under the Railway Labor Act indicated that respondents would not sue promptly or at all on the award but would allow the full pressure of the circumstances to operate, re-inforced by exertion of their own economic power, through threat of a strike, for the purpose of obtaining from the carrier full compliance with the award without a judicial determination of the basic rights and liabilities of the parties under their contract.*

Accordingly, petitioner, being desirous of having its rights under the contract judicially determined and having no other method open to it of achieving that result, instituted this suit under the Declaratory Judgments Act to obtain a judicial determination and declaration of its rights and liabilities under the contract of February 1, 1923. (Complaint, Par. 33; R. 13.)

Respondents, in the first defense set up by their answer, alleged that the complaint failed to state a cause of action. In the second defense of their answer, respondents contended—apparently because the com-

* See *infra*, pp. 29-32.

plaint showed on its face the proceedings before the Adjustment Board—that:

> "(1) The Complaint fails to show the existence of an actual controversy between the plaintiff and the defendants;
>
> (2) The Complaint affirmatively shows that there exists a remedy especially provided by statute for this type of case;
>
> (3) The Complaint affirmatively shows that the purpose of the plaintiff in filing this action was to secure judicial review of a decision of an administrative Board, a purpose not contemplated by, nor permitted under, the Declaratory Judgments Act;
>
> (4) The Complaint fails to show the existence of any statute or order about to be enforced against the plaintiff, or from the enforcement of which any damage will result to the plaintiff" (R. 55).

On the grounds thus alleged in the first and second defense, the District Court, treating these defenses as a motion to dismiss, entered an order dismissing the complaint (R. 326). Petitioner appealed to the Court of Appeals, and that Court, after considering the case for nearly two years, affirmed the District Court in an opinion by Rutledge, *J.*, with Stephens, *J.*, dissenting (R. 331-81; 124 F. (2d) 235-77).

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals of the District of Columbia erred:

(1) In holding that Section 3 First (p) of the Railway Labor Act is to be construed, despite the absence of express statutory language to that effect, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of jurisdiction to entertain a declaratory judgment proceeding, where such a proceeding would otherwise be appropriate;

(2) In holding that Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer, with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes;

(3) In holding that the construction given by it to the Railway Labor Act, to the effect that the unilateral submission of such a dispute by the employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the courts to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Act, is not an unreasonable construction and is not inconsistent with

the reasoning of this Court in *Moore* v. *Illinois Central R. Co.*

(4) In holding that a construction of the Railway Labor Act which prevents the granting of the relief here sought by petitioner does not render that Act of doubtful constitutionality; and

(5) In affirming the judgment of the District Court below.

REASONS FOR GRANTING THE WRIT.

This case presents important new questions with respect to the construction of the Railway Labor Act of 1934. The decision of the Court of Appeals below, from which Judge Stephens dissented, should be reviewed by this Court because:

1. The construction placed upon the Railway Labor Act, and particularly Section 3 First (p) thereof, by the majority of the Court of Appeals below is unreasonable, in that, although unsupported in the legislative history or the language of the Act or in any authoritative interpretation or statutory analogy, it nevertheless gives to the Act an operation which, under the facts in the case at bar, has the effect of compelling the carrier to submit to the method of "adjustment" provided therein — although admittedly not intended by Congress to be a system of compulsory arbitration—and also of compelling the carrier to accept as final, and to comply with, an award against it by the Adjustment Board—admittedly

a non-judicial body—without any opportunity for a judicial determination of its legal rights and liabilities under the contract on which such award is purportedly based.

2. The majority of the Court of Appeals below erroneously conclude that to permit the maintenance of a suit like the present one would deprive the employes of advantages which Congress intended them to have under Section 3 First (p) of the Railway Labor Act, and for the preservation of which the majority contend that the procedure provided in that Section must be regarded as exclusive of any other method of obtaining a judicial determination of the rights and liabilities of the parties under their contract. The truth is that the institution of a proceeding like the present one does not in fact prevent the employes from obtaining any advantages which Congress may have intended them to have by such a suit.

3. The decision of the majority of the Court of Appeals below is in conflict with the reasoning and decision of this Court in *Moore* v. *Illinois Central R. Co.*, wherein it was held that the procedure provided by the Railway Labor Act for the adjustment of disputes arising out of contracts between carriers and their employes was not intended to be exclusive but was intended to be a voluntary system of adjustment;

4. The construction placed upon the Railway Labor Act by the majority of the Court of Appeals below is not to be adopted if an alternative construction is available, because it would render that Act of doubtful constitutionality, in that its practical operation would be to deprive

petitioner of any opportunity for a judicial determination of its rights and to compel it in fact to be bound by the award of a non-judicial body, to wit, the Adjustment Board.

The Railway Labor Act of 1934 created the National Railroad Adjustment Board as a means of "adjusting" disputes arising out of contracts between carriers and their employes concerning rules, rates of pay and working conditions. After the possibilities for settling such a dispute through negotiation and discussion have been exhausted, the dispute may, under the Act (Section 3 First (i)), be submitted jointly by both parties, *or by either party separately,* to the Board. The Act provides in Section 3 First (p) thereof for a method of judicial determination of the rights and liabilities on which an award is purportedly based, on the initiative of the employes, but no method for such judicial determination on the initiative of the carrier is provided. The only provision in the Act which specifies the status or effect of an award of the Board in such a suit by the employes under Section 3 First (p) is that portion of Section 3 First (p) which provides that, in a suit thereunder, "the findings and order of the Division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated." There is nothing in the Act which purports to deny to the carrier-employer any right of action or recourse to any procedure which would otherwise be open to such employer.

1. The National Railroad Adjustment Board is Not Entitled to be Regarded as a Judicial or Quasi-Judicial Tribunal, in View of the Manner in Which it is Constituted and the Nature of its Procedure.

The National Railroad Adjustment Board, because of the way in which its members are chosen and compensated and because of the procedure which it follows, cannot be regarded as a judicial or quasi-judicial tribunal (like the Interstate Commerce Commission, the Federal Communications Commission or similar bodies) whose adjudications may foreclose the issues decided from being re-examined *de novo* in a court of law. In the first place, the Board is not, and under the Act is not intended to be, a body of public administrative officials compensated from the public treasury. The Act provides (Section 3 First (a)) that the Board shall consist of members, half of whom are selected by the carriers and half by such organizations of employes, nation-wide in scope, as have been or may be organized in accordance with the provisions of Section 2 of the Act. It is further provided (Section 3 First (g)) that "each member of the Adjustment Board shall be compensated by the party or parties he is to represent."* In this

* The Act does provide that, where a referee is called in for the purpose of breaking a deadlock among the members of the Board, such referee shall be paid by the Mediation Board, which is a governmental agency (Section 3 First (l)). However, a referee who is thus called in for particular cases is not a regular member of the Adjustment Board, and is not a specially trained administrator, "informed by experience" of the specialized character which is found in the case of a member of the Interstate Commerce Commission, for example. (See *Illinois Cent. etc. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 454 (1907)). Furthermore, his vote is only one of the votes which decide the case.

respect the Board is of course an altogether different type of body from a quasi-judicial tribunal like the Interstate Commerce Commission, whose members are appointed by the President and paid from the United States Treasury.

In the second place, the procedure followed by the First Division of the Adjustment Board is not that of a judicial or quasi-judicial body. Under the Act (Section 3 First (i)), the Board may render an award on the submission of one of the parties alone, without the joinder or appearance of the other party. If the carrier does appear, it is required by the First Division to answer the claim without seeing the statement of claim presented to the Division by its adversary. (Complaint, Par. 20, Ex. E; R. 8, 41-42.) At the so-called "hearings" before the Division, no witnesses are called to testify and no evidence is introduced as to the facts relied on by the claimants; *ex parte* allegations are received by the Division as proof, without any opportunity to the parties for cross-examination or other means of testing the truth of the allegations. (Complaint, Pars. 22-23; R. 8-9.) No record, stenographic or other, is made of the hearing. (Complaint, Par. 23; R. 9.) If the Division is unable to reach a decision because of deadlock among its members—as was the situation in the present case—a referee is called in under the provisions of the Act (Section 3 First (l)), and the referee joins in the decision of the case without evidence and without any argument, written or oral, from the

parties. (Complaint, Pars. 24-25; R. 9.) Finally, the award of the Division contains no findings of fact in any proper sense. (See so-called "findings" and award in present case—Complaint, Par. 26; R. 9.)

Clearly, this procedure is wholly unlike that followed by the Interstate Commerce Commission and other quasi-judicial tribunals. That the Adjustment Board is neither constituted nor operated as a judicial or quasi-judicial body has been freely admitted by the respondents in their briefs in the courts below (R. 86-87, 131). For example:

> "Both in personnel and in organization this Board departs somewhat from traditional *judicial* concepts. Judicial tribunals are non-partisan and the litigant is protected in his cause by the impartiality of the judge. The Adjustment Board is bipartisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are predisposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is against him, his cause must surely be just and he will prevail." (Defendants' Memorandum Brief, p. 20, R. 86.)

And again:

> "A judge *decides* the case before him, while, as its name implies, this Board is intended to adjust matters submitted to it. 'Compromise' judgments of courts are contrary to the whole theory of the law, while a reasonable and acceptable compromise embodied in an order of the

Board will often fulfill the exact purpose for which it was created." (Defendants' Memorandum Brief, p. 21, R. 87.)

Respondents have thus admitted that the Adjustment Board does not act judicially:

"Its own organization is not that of a non-partisan judicial tribunal, but of a bipartisan conference group. Its function is to adjust, to compromise, to settle, rather than to judge the disputes which come before it." (Defendants' Memorandum Brief, p. 65, R. 131.)

Indeed, respondents have gone so far as to state in their briefs below, that the function of the Board is not the judicial one of interpreting and applying the basic agreement between the parties, out of which the dispute arises, but rather that of making new arrangements—in other words, a new agreement—between the parties if in the judgment of the Board such new arrangements are essential to a proper continuance of the parties' future relationship (R. 132-133). Thus, respondents have said:

"* * * *The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement.* The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decision which the Board is empowered to make in relation to a dispute before it.

"*The function of a court is to render a judgment between parties who are before it as liti-*

gants. Such a judgment has the effect of establishing the parties' present rights. *With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary.* It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.

"In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts. The parties before it, carrier and employees, are parties to a continuing relationship. The *future* of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but *the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption."* (Defendants' Memorandum Brief, pp. 66-67, R. 132-133.) (Emphasis supplied.)

In view of these facts, and the admissions made by respondents, it is quite clear that the Adjustment Board is in no sense a judicial or quasi-judicial tribunal, with respect to its intended function, its composition, or its operation. And yet, the decision of the majority of the Court of Appeals below construes the Railway Labor Act so as to give it the

effect of depriving a carrier in petitioner's position, who has been compelled by the employes' unilateral submission to be subjected to the issuance of an award against it by this non-judicial body, of any opportunity for a judicial determination of its rights and liabilities under its contract, save at the will of the employes in a suit brought to enforce such award under Section 3 First (p) of the Act. On the facts of this case, the result of that situation is that the carrier is forced by economic pressure to abide by the award of the non-judicial body without any judicial determination of its rights.

2. Under the Decision of the Majority of the Court of Appeals Below as Applied to the Facts of This Case, the Railway Labor Act Operates in Such a Manner as to Impose Upon the Carrier a Compulsory Method of Adjustment of Disputes With its Employes and to Deprive the Carrier of Any Opportunity for a Judicial Determination of its Rights and Liabilities.

Since the Railway Labor Act makes it possible for employes to submit a dispute to the Adjustment Board entirely without the consent of the carrier, it follows that if, after such a unilateral submission and the issuance of an award favorable to the employes, the carrier is denied—as it is under the decision of the majority below—the opportunity of obtaining a judicial determination of its rights except in a suit brought by the employes under Section 3 First (p) of the Railway Labor Act, then the carrier is in effect

deprived of an opportunity to have its contract rights judicially determined, save at the option of the employes. But the fact is plain that it is not to the employes' interest to bring such a suit under Section 3 First (p), because, when an award is of such doubtful legality that it would probably not be sustained by a court, they can obtain compliance with the award as a result of the economic pressure of the circumstances and of their own economic power, which ordinarily are sufficient to compel the carrier to comply with the award.* The consequence is that the carrier is in effect compulsorily deprived of any opportunity for a judicial determination of its rights under the contract on which the award is purportedly based.

The fact that the adjustment procedure set up under the Act does as a practical matter operate in this compulsory way upon the carrier is clearly demonstrated by the circumstances of the case at bar.

The record shows that, when efficiency and promptness of operation require it, it is petitioner's present practice to employ the road-crews to do the work in question (Complaint, Par. 10; R. 5-6). It is not only petitioner's right but it is also in the public interest that petitioner's operations should be conducted in the most efficient and expeditious manner possible. Imposition upon petitioner of the requirement that the work in question should be done by respondents, in accordance with their claim and in

* See *infra*, pp. 30-32.

place of petitioner's present practice, would, on the allegations of the complaint—which must be taken to be admitted for the purpose of this stage of the proceeding—interfere with and impair the efficiency of petitioner's operations. The award of the Adjustment Board, in sustaining respondents' claim, requires in effect that petitioner change its operating practices in this respect, so as to permit respondents to do this work. Furthermore, the award, if complied with, requires that respondents be paid full wages for each day that they have not been permitted to do the work, subsequent to the presentation of their claims.

When petitioner is faced with such an award of the Board as that sustaining respondents' claim, it has two alternatives before it. In the first place, it can immediately comply with the award and change its operating practices so as to permit respondents to do the work. If it does so, it will be sacrificing its own interests, and also the public interest, by interfering with the efficiency of its operation, and will be doing so without any judicial determination as to whether or not it is legally obliged to do so. In the second place, it can refuse to comply with the award and continue its practices as they are at present. But if it adopts this alternative, each additional day in which it refuses to permit respondents to do the work will add to the amount which it will have to pay to respondents if it should be ultimately determined that the award of the Board rests upon a proper construction of the contract. For example, if

it adopts this second alternative, it may so happen that, on the 364th day of the second year following issuance of the Board's award, it will be confronted with a suit under Section 3 First (p) of the Railway Labor Act, which suit might, if the Board's award is upheld, result in petitioner's being compelled to pay back wages to respondents for 728 more days' wages than would have been the case if petitioner had complied with the award on the day following its issuance.

In other words, the total cost to petitioner in connection with the dispute in question would be very much less if it sacrificed its right to a judicial determination of the issues and complied promptly with the Board's award than the cost would be if it refused compliance and was ultimately compelled to yield to respondents' demands by suit brought at the last possible moment under the Railway Labor Act. If petitioner is denied declaratory relief in the present proceeding, there is no way for it to avoid the risk of having ultimately to pay the much larger sum, except by prompt compliance with the award. It is obvious that, under such circumstances, the passage of time following the Board's award, and the consequent mounting of the sum which petitioner may ultimately have to pay, operates to increase continually the pressure on petitioner to comply promptly with the Board's award, and thereby to impede the efficiency of its operation, without a judicial determination as to whether or not it is legally obliged to do so.

Still more importantly, in addition to this pressure created by the circumstances of the situation, the organizations of the employes are always in a position to exert and do in fact frequently exert the full pressure of their economic power, through threat of a strike, to compel compliance with such awards of the Board. This was admitted by respondents in their brief in the District Court below, where they said: "The orders of the Board find their primary sanction in the *collective economic bargaining power of the employees*" (R. 103). (Emphasis supplied.)* It is a well known fact that under modern conditions carriers are held primarily responsible by public opinion for the maintenance of undisturbed transportation operations, and this is a responsibility which carriers cannot afford to disregard. The threat of a strike directly impedes the proper discharge of this responsibility in such a way that it creates a serious and effective pressure upon the carrier to comply with the employes' demands, and so constitutes a weapon which can seldom be ignored or defied. Of course it is true that the Railway Labor Act provides for the appointment of an Emergency Board by the President in the case of a threatened strike, and prohibits any change in the *status quo* during the consideration of the dispute by such Emergency Board and for a period of thirty days thereafter.† However, this additional procedure provides no relief for the carrier, since there is nothing in the law to prevent the employes from renewing the pressure of their economic power after the expiration of thirty days following the decision of the Emergency Board, in the event that

* See also *infra*, pp. 30-32.

† Act of May 20, 1926, c. 347, sec. 10, 44 Stat. 586-87, 45 U. S. C. 160.

they do not like that Board's decision.* Moreover, resort to the Emergency Board procedure serves merely to prolong the delay which of itself operates to compel compliance with the award, and contains no more assurance of an ultimate judicial determination of the rights of the parties than does the procedure before the Adjustment Board. The function of the Emergency Board is not to determine judicially the legal rights and liabilities of the parties under the contract but merely to endeavor to find some method of settling the dispute, if possible.

These circumstances mean that, if declaratory relief is to be denied to a carrier in the position of petitioner in this case, employes having a dispute with the carrier may first compel a submission of the dispute to the Adjustment Board, without any consent on the part of the carrier, and may thereafter by economic pressure compel the carrier's complance with an award by the Board in the employes' favor, without any judicial determination of the rights and liabilities of the carrier under its contract with the employes. The fact that the Railway Labor Act does in practice actually thus operate to compel compliance by carriers with awards by the Board against them is demonstrated by the almost complete absence of suits under Section 3 First (p) to enforce awards against carriers. The opinion of the majority below shows that, according to statistics available in 1938,

* The events of the recent nation-wide wage controversy between the rail carriers and the employes' organizations, of which this Court may take judicial notice, illustrated the possibility of a threatened strike against a decision of an Emergency Board not acceptable to the employes' organizations.

out of a total 3,134 decisions rendered by the Board up to that time, the claims against the carriers were sustained in full in 1,745 cases and in part in 394 additional cases—altogether, nearly two-thirds of the total (R. 336, note 11; p. 242 of 124 F. (2d)). And yet there were only two cases in which a judicial determination was had of the rights of parties thus concerned with an award of the Adjustment Board. One such case is cited by the majority below (R. 342, note 24; p. 246 of 124 F. (2d)), as the only case discovered of an enforcement suit under Section 3 First (p) of the Act: *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5th, 1937). Another case of judicial review of Adjustment Board action is cited in Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 Yale, L. J. 567, at p. 592 (an article which is referred to several times by the majority below), viz., *Griffin* v. *Chicago Union Station Co.*, 13 F. Supp. 722 (N. D. Ill., 1936). In this connection, the following passage from Garrison's article is worth noting (pp. 591-92):

> "The Board has no powers of enforcement, and therefore non-compliance by a carrier may continue with impunity unless the union acts to obtain compliance. This the union can do in two ways: first, by petitioning the appropriate United States District Court for an order enforcing the Board's award, pursuant to the procedure laid down by the statute; and secondly, by economic pressure. *The first course has not been adopted.* Out of 1,616 awards handed down by the four Divisions up to July 30, 1936, of which considerably over half must have been in favor of

the employees, not one was taken to court for an enforcement order, and *the presumption is either that the carriers willingly complied in all these cases, or that, in some of the cases where the carriers did not at first comply, compliance was brought about by threatened strikes.*

"The net result is that, with one exception, *no judicial review of the Board's capacity, procedure or decisions has been had, and none is likely to be had.*" (Emphasis supplied.)

3. The Present Proceeding is an Appropriate One for the Exercise of Declaratory Judgment Jurisdiction, in the Absence of Some Statutory Impediment.

In view of these circumstances, it is clear that the case is an appropriate one for the exercise of declaratory judgment jurisdiction, under the Federal Declaratory Judgments Act. It is an actual controversy, consisting of specific claims for money made by respondents and refused by petitioner. (Complaint, Par. 29; R. 11.) The demands of respondents are made under and on the basis of the contract between the parties, and not under the Board's award, as respondents have admitted.* In such a situation a

* Thus, in their brief in the District Court below (included in the record of the Court of Appeals below and in the record filed with this petition) respondents stated:

"These claims, however, *are based upon the Agreement of 1923—not upon the order of the Board*" (R. 117). (Emphasis as in respondents' brief below, p. 51.)

Again, in the same brief (p. 53):

"When the individual defendants presented to the plaintiff, individual claims for compensation, they necessarily based those claims upon the Agreement—not upon the order which has no substantive effect and is in itself unenforceable * * *. *The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued*" (R. 119). (Emphasis supplied.)

declaratory judgment proceeding initiated by the party defending against the claim is appropriate for determination of the rights of the parties, even though the claimant has available another procedure by which he could enforce his claim but to which he does not resort: *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 57 S. Ct. 461 (1937). Moreover, the circumstances of the present case, whereby, as shown above, petitioner is subject to increasing economic pressure toward compliance with respondents' demands, make declaratory relief not only an appropriate but a necessary remedy.* Nor is resort to a declaratory judgment proceeding barred, in this case, by the authorities which establish the rule that such a proceeding may not be used to review the decision of another judicial or quasi-judicial tribunal, since that rule clearly does not contemplate awards of a body like the National Railroad Adjustment Board, which, as shown above (pages 20-25), is not constituted and does not operate in a judicial or quasi-judicial manner and is not in any sense such a tribunal.

The majority of the Court of Appeals below did not deny that the present controversy would be an appropriate one for the exercise of declaratory judgment jurisdiction in the absence of the Railway Labor Act. However, the majority below took the position that Section 3 First (p) of that Act manifested a

* This point is substantiated by the legislative history of the Federal Declaratory Judgments Act, as well as by judicial interpretation of it, as for example, in *Edelmann and Co.* v. *Triple-A Specialty Co.,* 88 F. (2d) 852, 854 (C. C. A. 7th, 1937). See the discussion by Judge Stephens in his dissenting opinion below (R. 356; pp. 258-9 of 124 F. (2d)).

Congressional intent that the procedure provided for therein should be exclusive of all other methods of judicial determination of the rights of the parties.

4. It is Erroneous to Conclude, as Does the Majority Below, That Section 3 First (p) of the Railway Labor Act Must, in Order to Preserve to the Employes Advantages Thereunder Which Congress Intended Them to Have, be Construed to Exclude Any Other Proceeding, Such as the Present One, for the Judicial Determination of the Rights and Liabilities of the Carrier and Its Employes Under Their Contract.

It is not claimed by the majority of the Court of Appeals below that there is anything in the legislative history of Section 3 First (p) of the Railway Labor Act to indicate that it was intended to be exclusive of all other methods of judicial determination of the rights of the parties, and such a claim could not successfully be maintained, because no reference whatever to Section 3 First (p) is to be found in the reports of legislative consideration given the Act in the Houses of Congress.* Moreover, there is no language in the Act itself which specifically indicates that the procedure under Section 3 First (p) was intended to be exclusive. The majority below did, however, conclude that an intent on the part of Congress that the procedure under Section 3 First (p) should be exclusive could by implication be inferred from the provisions of that Section. The

* See House Report No. 1944 and Senate Report No. 1065, 73d Congress, Second Session.

reason advanced by the majority for arriving at that conclusion was that the method of judicial determination provided in Section 3 First (p) of the Act gives to the employes certain definite advantages which Congress intended them to have and to retain unimpaired. The intent of Congress to secure these advantages to the employes would be frustrated, the majority below concluded, if the carrier of its own motion were permitted to seek judicial determination of its rights under the contract.*

But if that argument is sound, then it would serve to defeat every declaratory judgment proceding, since in every such proceeding the party against whom declaratory relief is sought, and who would otherwise have the initiative, is deprived of the advantage of having that initiative, including choice of venue and forum and of the time of bringing suit. And yet it is well established that the right of a beneficiary under an insurance policy, for example, to bring suit against the insurer for the purpose of enforcing the policy, and the attendant privileges with respect to choice of venue and time, do not bar a declaratory judgment proceeding instituted by the insurer for the determination of an existing controversy, in the absence of an actual suit by the beneficiary on the policy (see, e. g., *Aetna Life Ins. Co.* v. *Haworth, supra*).

Moreover, the majority below failed to realize that

* See discussion in majority opinion below (R. 333-35; pp. 239-41 of 124 F. (2d)).

the institution of a declaratory judgment proceeding like the present one does not in any way bar the employes in whose favor an award has been issued from securing for themselves the advantages of Section 3 First (p) by instituting suit thereunder. Under the governing principles and authorities it is clear that such a suit, if promptly instituted by the employes, could proceed to judgment notwithstanding the prior institution of the declaratory judgment proceeding. The declaratory judgment suit, being a proceeding purely *in personam,* would not operate as a bar to a subsequently instituted suit under Section 3 First (p) of the Railway Labor Act. This is clearly established by the cases.† Moreover, the court having jurisdiction of the declaratory judgment suit would have discretionary power to stay that proceeding in favor of the employes' suit under Section 3 First (p), and, upon a proper application by the employes as defendants in the declaratory judgment suit and upon a showing by them that Congress intended them to have advantages in the suit under Section 3 First (p) which they could not have in the declaratory judgment suit, the court would undoubtedly exercise its discretion to stay the declaratory judgment proceeding, so as to permit the suit under Section 3 First (p) to proceed to judgment without

† See especially *Kline* v. *Burke Const. Co.,* 260 U. S. 226, 230, 43 S. Ct. 79, 81 (1922); and *New York Life Ins. Co.* v. *Roe,* 102 F. (2d) 28, 31-32 (C. C. A. 8th, 1939)—the latter case involving a situation closely analogous to the present one.

risk of conflict.* Refusal by the court to grant such a stay would clearly be an abuse of its discretion, particularly since during the argument in the District Court counsel for petitioner offered to raise no objection to permitting a suit by the employes under Section 3 First (p) to proceed in preference to the declaratory judgment suit (R. 300).

The purpose of petitioner in instituting the present declaratory judgment suit is not to deprive the employes of advantages in litigation which they would have and which Congress intended them to have in a proceeding under Section 3 First (p) of the Railway Labor Act. Petitioner is concerned, not that it shall have judicial relief in any particular form, but that it may have an opportunity for judicial determination, in *some* form, of its rights and liabilities under the contract with its employes, and that it shall not be forced to comply with the Board's award without judicial consideration of the question whether that award represents a correct interpretation of petitioner's obligations under the contract.

Clearly, therefore, the majority of the Court of Appeals below erred in assuming that it was necessary to construe the Railway Labor Act so as to exclude a declaratory judgment proceeding like the present one, in order to preserve to the employes such advantages as Congress intended them to have in a suit under Section 3 First (p).

* See, for example, *Landis* v. *N. American Co.*, 299 U. S. 248, 254-55, 57 S. Ct. 163, 166 (1936), and also the language of Mr. Justice Cardozo in *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 212-16, 57 S. Ct. 377, 379-80 (1937).

5. The Decision of the Majority of the Court of Appeals Below, in so Construing the Railway Labor Act as to Give It a Compulsory Effect in its Practical Operation, is in Conflict With the Reasoning of This Court in Moore v. Illinois Central R. Co.

Subsequent to the argument of the instant case in the Court of Appeals, but prior to publication of the decision of that court, this Court decided the case of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941). Both the majority and the dissenting opinions in the Court of Appeals discuss the *Moore* case, although there had been no argument before the court as to its applicability to the present case. The decision of this Court in the *Moore* case squarely establishes the proposition which petitioner herein advanced in the Court of Appeals below, to the effect that the method provided in the Railway Labor Act for the adjustment of disputes arising out of contracts between carriers and their employes is not an exclusive method for the adjustment of such disputes. In so holding, this Court said that the adjustment procedure provided in the Railway Labor Act was not "based on a philosophy of legal compulsion," but was essentially a "system for peaceful *adjustment and mediation voluntary in its nature.*" (Emphasis supplied.)*

* See pages 634-36 of Mr. Justice Black's opinion in 312 U. S. In that case suit was brought in behalf of an employe against the railroad for damages for breach of contract, and this Court, in sustaining the district court's judgment for the employe, rejected the argument that the suit was prematurely brought because the employe had failed to exhaust the so-called "administrative" remedies granted him by the Railway Labor Act.

It has been shown above that the denial by the majority of the Court of Appeals below to the carrier of an opportunity for a judicial determination of its basic rights otherwise than by a proceeding brought by the employes under Section 3 First (p) means that a carrier having a dispute with its employes may be compelled, by unilateral submission of the dispute on the part of the employes to the Adjustment Board, to subject itself to a decision of that Board under the adjustment procedure provided in the Railway Labor Act, and may further be compelled, by economic pressure, to comply with an award of the Board against it, without any judicial determination of its rights and liabilities under the contract on which the award is purportedly based. Clearly, a system of adjustment which operates in such a manner can only be described as in fact compulsory, and the decision of the majority below must be considered as so holding. In that respect, it is directly in conflict with the reasoning of this Court in the *Moore* case. If a carrier is denied the opportunity of obtaining declaratory relief in a proceeding like the present one, the method of adjustment provided in the Act, so far from being a system "voluntary in its nature," is in fact one which operates in actual practice to *compel* the carrier to abide by the result of the adjustment method. A method of adjustment which operates in that manner is in no sense voluntary, in so far as the carrier is concerned.

The majority of the Court of Appeals below ap-

parently recognized the inconsistency between the result which they reached and this Court's decision in the *Moore* case, and attempted to establish a distinction between the two cases. The majority below conceded that, under the *Moore* decision, the method of adjustment provided in the Act was one which the parties were not obliged to choose in the first instance, and that the employes, for example, could ignore the statutory procedure altogether and recover against the carrier in a suit for damages. However, the majority below took the further position that there was no conflict with the *Moore* decision in holding that, when the parties had once "voluntarily" invoked the method of adjustment provided in the Railway Labor Act, they were thereafter bound to abide by that method, and, when an award of the Board had been issued, were limited to the procedure provided in Section 3 First (p) of the Act, as the only means of obtaining a judicial determination of the rights of the parties under the contract on which the award was purportedly based.

This conclusion is erroneous, for the double reason that (1) it fails to distinguish between a joint submission by the parties under Section 3 First (i) of the Act and a separate submission under the same paragraph by the employes without the joinder or consent of the employer, and treats action by the carrier in appearing before the Board to ward off a default award, as equivalent to a joinder by it in the submission, whereas it is not so equivalent, and (2) be-

cause, even if this distinction is ignored, the conclusion of the majority below rests upon assuming the point to be proved, namely, that where there has been a voluntary resort to the adjustment procedure the statutory judicial remedy under Section 3 First (p) must be treated as exclusive—an assumption which is based solely upon the argument shown in the preceding section to be unfounded, that otherwise the employes would be deprived of advantages which Congress intended to secure to them.

The majority below treat the submission of the dispute to the First Division of the Adjustment Board in the present case as a joint submission or a submission with the consent or participation of petitioner, and conclude therefrom that such consent on petitioner's part thereafter barred it from obtaining a judicial determination of its rights otherwise than as such might be obtained if respondents after the award should bring a suit under Section 3 First (p). The notion of the majority below seems to be that where, as in the present case, the carrier separately appeared before the Board to avoid a default-award against it resulting from a unilateral submission of a dispute by the employes, which submission the carrier had refused to join, such separate appearance constitutes a voluntary choice or election on the part of the carrier of the method of adjustment provided in the Railway Labor Act, including the procedure set up in Section 3 First (p) thereof, as the appropriate

method of settling the dispute.* The defectiveness of this reasoning is plain. It results from ignoring the fact that, under the Railway Labor Act (Section 3 First (i)), the adjustment procedure therein provided may be invoked by either party, acting separately, by the submission of the dispute to the Board by such party without the consent of the other party or parties to the dispute. As a consequence of this provision in the Act, the Board has claimed, and has in fact exercised (as appears from its published reports†) the power to enter an award, in the case of a dispute so submitted, regardless of whether or not the carrier appears before it. Under such circumstances, the separate appearance of the carrier in opposition to a unilateral submission of the dispute by the employes is not in any sense a voluntary election on the part of the carrier to resort to the statutory method of adjustment,—as might be true in the case of a joint or concurrent submission by both parties—because the Board would proceed without such appearance by the carrier and would enter an award against it in default of appearance. It follows that the status of the Board's award with respect to the rights of the carrier is not in any respect altered or enhanced by the fact that the carrier may have separately appeared, as in the

* See discussion in majority opinion below (R. 338, 345; pp. 243-4, 249 of 124 F. (2d)). The comments on this point in a footnote to the opinion (R. 332, note 5; p. 239 of 124 F. (2d)) suggest a confusion in the minds of the majority between questions as to a court's power over the *person* of a party, which is conceded by a general appearance by that party, and questions as to its power in other respects to adjudicate the issues before it, which is not conceded by such an appearance.

† Vol. 12, "Awards, First Division, National Railroad Adjustment Board," pp. 318-370, inclusive (Government Printing Office).

present case, because the Board would have rendered precisely the same award in the absence of the carrier.

Accordingly, petitioner's separate appearance before the Board, in order to avoid the risk of having the Board make a default-award against it, cannot be treated as equivalent to a joint submission of the dispute to the Board. Such a joint submission might perhaps have constituted, on the part of petitioner, a voluntary choice or election of the adjustment method, of the kind the majority below had in mind. But there was no such joint submission. Therefore, there was no voluntary acceptance by petitioner of the adjustment method. The petitioner appeared merely to ward off a default-award, and, since the Adjustment Board admittedly does not constitute a tribunal of compulsory arbitration (R. 103), the appearance of petitioner before it cannot be held to constitute a waiver of any right to a judicial determination which petitioner would have in the absence of a joint submission to the Board.

From this it follows that the majority below have failed successfully to distinguish the present case from the decision of this Court in the *Moore* case. There was no voluntary choice or election on the part of petitioner in separately appearing before the Board in opposition to the employes' unilateral submission of the dispute, and the fact therefore remains that, under the decision of the majority below, the operation of the method of adjustment provided in the Act is compulsory, so far as the carrier is concerned,

contrary to the construction placed upon the Act by this Court in the *Moore* case.

Even conceding, however, and solely for the purpose of argument, that the majority below is correct in holding that there was an element of voluntary choice on the part of petitioner in appearing before the Adjustment Board, it does not follow that petitioner is thereby barred from any judicial proceeding for the determination of its contract rights otherwise than in a suit brought by the employes under Section 3 First (p). That conclusion would follow only by making a further assumption, which would be an assumption of the very point to be proved. It would follow only if it is taken for granted that the suit under Section 3 First (p) must be treated as an exclusive judicial remedy with respect to claims which have been submitted to the Adjustment Board. In the absence of any express Congressional intent to make that procedure exclusive, the conclusion that it must be regarded as such is founded by the majority of the Court of Appeals solely on the argument which has already been shown in the preceding section of this petition to be erroneous, viz., that otherwise the employes would be deprived of advantages which Congress intended to secure to them. Without the support of that argument, there is no foundation for the conclusion that, even if petitioner did participate in the proceeding before the Adjustment Board, it has thereby lost its right to any judicial remedy that might otherwise be open to it.

In short, the sole ultimate ground upon which the

decision of the majority below rests is comprised in the argument that this suit cannot be maintained because it would deprive respondents of the advantages that they would otherwise obtain from Section 3 First (p) of the Act, and that argument has been shown above to be completely erroneous. In the last analysis, that is the single issue upon which all the other issues now presented to this Court depend.

The majority below were apparently conscious of the difficulty involved in holding petitioner barred from its right to a judicial remedy, as well as of the difficulty of reconciling their position with the decision of this Court in the *Moore* case. This consciousness of uncertainty is shown by the suggestion made in the majority opinion that perhaps Section 3 First (p) of the Railway Labor Act should be construed not to bar altogether resort to the courts in a proceeding other than that provided therein, after submission to the Board and an award therefrom, but only to *suspend* the right of a carrier to invoke judicial relief in another form of proceeding during the two-year period following the issuance of the award, in which a suit under Section 3 First (p) can be instituted.*

The suggestion is offered tentatively by the majority below, apparently as a possible escape from the im-

* This appears in the language which the majority below used in connection with the *Moore* case (*e. g.*, R. 338, 345; pp. 243-4, 249 of 124 F. (2d)), especially the following:

> "The important thing is that the statute gave the initiative in litigation to review the award to the employee for two years. *For disposing of this case, it is immaterial whether this amounted to a mere suspension, for that period, of the employer's right to sue* or was intended, with other provisions of the Act, to bar it altogether" (R. 347; p. 251 of 124 F. (2d)). (Emphasis supplied.)

plied conflict between the decision of the majority below and the decision of this Court in the *Moore* case, and not as a positive holding of the court. But this suggestion serves merely to increase rather than to diminish the difficulties of the majority below. If Section 3 First (p) of the Railway Labor Act operates to suspend for two years the employer's right to a judicial determination of its dispute with the employe in any other proceeding than that provided by that Section, then, for the reasons already indicated, the procedure provided by the Railway Labor Act for adjustment of disputes becomes compulsory upon the carrier *for that period,* and to that extent is an embodiment of a "philosophy of legal compulsion," which, according to the *Moore* decision, was not within the intent of Congress.

Moreover, the suggestion that the carrier's right to a judicial determination of the issues in dispute otherwise than in a suit under Section 3 First (p) is merely suspended for two years does not provide any basis for dismissal of the present suit at this stage of the proceeding, since the two-year period has now expired, and had in fact expired when the decision of the Court of Appeals below was handed down. If this suggestion of the majority below were sound—and petitioner believes it is thoroughly unsound and serves merely to demonstrate the confusion in which the majority below find themselves—then, after the two-year period of suspension is over there would be no reason why the proceeding should not go forward, so as to permit a judicial declaration of the

rights of the parties. The reasoning of the majority below in this respect is thus in conflict with their conclusion. If the suggestion made in the majority's reasoning, that the carrier's right to a judicial determination otherwise than in a suit under Section 3 First (p) is merely suspended for two years following submission to the Board and an award therefrom, were really accepted by the majority below as sound, there would be no basis for reaching the conclusion which the majority in fact did, to the effect that this suit should be dismissed, even though the two-year period has expired. If, on the other hand, the suggestion is not a sound one—as petitioner believes—then the decision of the majority below must be construed as holding that resort by the carrier to a judicial determination of its rights is completely barred by the employe's unilateral submission of the dispute to the Board and the issuance by the latter of an award upholding the employe's claim. And in that event, for the reasons already shown, the decision of the majority below must be regarded as in conflict with the reasoning of this Court in *Moore* v. *Illinois Central, supra.*

The majority below seem to have in mind the notion that petitioner's separate appearance before the Adjustment Board constituted an election of remedies so as to bring into operation the doctrine according to which an election of one remedy may under some circumstances bar a subsequent shift to another inconsistent remedy. But this doctrine has no application to the present case, for two reasons: In the first

place, the doctrine presupposes a voluntary choice or election of the remedy first resorted to,* and it has already been shown that there was no such choice or election on the part of petitioner in this case. In the second place, the doctrine applies only where the remedies are inconsistent,† and no such condition exists in the present case, because both of the remedies in question are predicated on the same contract and the same theory as to the rights and liabilities of the parties, and are therefore not inconsistent with each other. Accordingly, the doctrine of election of remedies does not operate, under the facts of the present case, to bar the maintenance by petitioner of the present declaratory judgment proceeding.

6. Construction of the Railway Labor Act in the Manner Adopted by the Majority of the Court of Appeals Below, so as to Preclude Petitioner From Obtaining a Judicial Determination of its Rights in a Declaratory Judgment Proceeding, is, in the Light of the Facts of the Present Case, Unreasonable and Without Foundation, and Would Render the Act of Doubtful Constitutionality.

To construe the Railway Labor Act, and particularly Section 3 First (p) thereof, so as to bar petitioner

* See *Bierce* v. *Hutchins*, 205 U. S. 340, 346 (1907); *Pittsburgh Terminal Coal Corp.* v. *Bennett*, 73 F. (2d) 387, 389 (C. C. A. 3rd, 1934).

† See *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 294-5, 43 S. Ct. 100, 101 (1922); *McFadden Securities Co.* v. *Stoneleigh Garage*, 55 F. (2d) 1025, 1027 (App. D. C., 1932); *U. S.* v. *Ickes*, 73 F. (2d) 844, 849 (App. D. C., 1934). In fact, the doctrine of election of remedies appears to be regarded by modern courts with increasing suspicion, and its application today is limited and infrequent. See, for example, *Friederichsen* v. *Renard*, 247 U. S. 207, 211-13, 38 S. Ct. 450 (1918), and *Oil Well Supply* v. *First National Bank*, 106 F. (2d) 399, 404 (C. C. A. 10th, 1939).

from the right to bring the present proceeding, is in practical effect, as shown above, to preclude a carrier from any judicial determination of its rights under the contract with its employes, in a case where the employes have seen fit to submit a dispute to the Adjustment Board and thereby compel the carrier, without its consent, to be subjected to an award of the Board against it and to economic pressure toward compliance with the award. Clearly, such a construction of the Act is unreasonable. If the collectively bargained agreements to which the Act is intended to apply are really contracts, as the Act appears to contemplate, then there must be some practicable and available means for the parties, or either of them, to obtain a judicial determination as to the proper interpretation of the contract and their respective rights and obligations under it. *Otherwise, the effect of the Act would be—and, under the decision of the majority below, its effect is—to place these collectively bargained agreements in the same category as international treaties, which under present-day conditions have only such meaning and effect as the party with superior force chooses to allow them to have.* Petitioner believes that the Railway Labor Act should not be construed so as to reproduce international anarchy in the field of labor relations in the railroad industry, unless there is a clear and positive indication in the legislative history of the Act or on the face of the Act itself that Congress intended it to be so construed. But, as stated above (page 34), there is no such

indication either in the legislative history of the Act or on the face of the Act itself.

It has been claimed by respondents that Section 3 First (p) of the Railway Labor Act must be construed as providing an exclusive remedy because similar language in other statutes, viz., the Interstate Commerce Act and the Packers and Stock Yards Act has been so construed by the courts. But it is elementary law that similarly worded provisions in different statutes are not to be construed alike unless the statutes are *in pari materia*. And it is clear that the Railway Labor Act is not *in pari materia* with the Interstate Commerce Act and the Packers and Stock Yards Act, because the National Railroad Adjustment Board is not, for reasons already indicated (see pages 20-25, above), a quasi-judicial tribunal as is the Interstate Commerce Commission, for example, and also because an award of the Adjustment Board like that in the present case is not an order to pay a fixed amount of money, plus interest, but is in effect a finding that the carrier should change certain operating practices and also that it should pay to claimants a sum of money, the principal amount of which (quite apart from the question of interest) may vary substantially, according to the time in which and the conditions under which it is complied with. Therefore, the provisions of the Interstate Commerce Act and the Packers and Stock Yards Act do not provide an apt statutory analogy to the Railway Labor Act, and decisions con-

struing the former are accordingly not applicable to the latter.*

Construction of the Railway Labor Act in the manner adopted by the majority below, whereunder its operation will, as shown above, unfairly and unreasonably suppress judicial consideration and determination of the rights and liabilities of the parties with respect to any dispute which the employes may choose to submit to the Board, is to be rejected for the reason that the Act if so construed would be of doubtful constitutionality. So construed, it would mean that, despite the safeguards of Article 3, Section 1, of the Constitution of the United States and of the due process clause of the Fifth Amendment thereto,† one of two parties to a contract, viz., the carrier-employer party to a collectively bargained agreement with its employes, would, in the event of a dispute with respect to the interpretation of the contract, be bound by the decision of a non-judicial body of private persons, and would find the doors of the courts closed against it in actual effect, and held closed for a period of time sufficient to enable the other party to the contract to compel by extra-judicial means acquiescence in the construction of the contract

* In any event, a careful examination of the decisions cited by respondents and by the majority below in this respect shows that they do not establish any absolute rule of exclusiveness but simply hold that where the statutory judicial remedy under the Interstate Commerce Act, for example, is available to enforce a reparation order of the Commission, certain other statutory remedies are not available. See, *e. g., Baltimore & O. R. Co.* v. *United States,* 87 F. (2d) 605, 606; *Brady* v. *Interstate Commerce Commission,* 43 F. (2d) 847. *cf. Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 136-44, 59 S. Ct. 754, 760-64 (1939).

† See *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331 (1920).

favored by such other party. In place of such a result, the court should prefer a construction of the Act which would be consistent with all indications of Congressional intent as to the voluntary nature of the adjustment procedure, and at the same time would preserve to the statute a reasonable and fair operation and eliminate doubts as to its constitutionality.

This case is of basic importance not only because of the size of respondents' claims but also because of the operating practices involved, which petitioner, believing such practices to be essential to the efficiency of its operation and therefore desirable in the public interest, should not be compelled to change until its obligation to do so has been judicially determined; but the continuation of such operating practices may give rise to additional and increasingly numerous claims of the same nature, on the part of these or other similarly situated employes, and with respect to such claims petitioner will be without practical means of obtaining a judicial determination of its rights and liabilities if the relief herein sought is ~~not now~~ granted. If the decision of the majority of the Court of Appeals below is permitted to stand, a strong element of unfairness and unreasonableness will have been injected, with the approval of this Court and without any indication of Congressional approval or intent, into the relations between carriers and their employes.

WHEREFORE, it is respectfully submitted that this petition for a writ of *certiorari* to review the judg-

ment of the United States Court of Appeals for the District of Columbia should be granted.

JOHN DICKINSON,
GUY W. KNIGHT,
JOHN B. PRIZER,
1740 Broad St. Station Bldg.,
Philadelphia, Pa.
Counsel for Petitioner.

FEBRUARY 18, 1942.